IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 319

PACIFIC FAR EAST LINE, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, and CLARENCE G. MORSE, MARITIME ADMINISTRATOR, *Respondents*,

MATSON NAVIGATION COMPANY, *Intervenor*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 28, 1958.

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MATSON NAVIGATION COMPANY, *Intervener.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Pacific Far East Line, Inc. ("PFEL") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on May 1, 1958.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals (R. 638) is reported at 255 F.2d 182 (D.C. Cir., May 1, 1958). It is printed in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 1958 (R. 638). A petition for rehearing was timely filed on May 16, 1958 (R. 642), and was denied on June 5, 1958 (R. 666, 667). The jurisdiction of this Court is invoked under 5 U.S.C. § 1046 (64 Stat. 1132).

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that upon a "plain meaning reading" of the term "Shipping Act, 1916, as amended", as used in the Review Act of 1950 (5 U.S.C. §§ 1031-1042), it lacked jurisdiction to review orders under the Merchant Marine Act, 1936 (46 U.S.C. §§ 1101-1294), notwithstanding that (1) the Merchant Marine Act, 1936, in fact amends the Shipping Act, 1916; (2) the legislative history of the Review Act (Appendix D) proves that Congress intended to include "all reviewable orders" of the Maritime Commission, Federal Maritime Board, and Maritime Administration[1] within the Review Act; (3) the terms "Shipping Act" and "Merchant Marine Act" have frequently been employed interchangeably by

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[1] The Federal Maritime Board and Maritime Administration, hereinafter the "Board" and "Administration", are related but separate agencies which succeeded to the functions of the former Maritime Commission under Reorganization Plan No. 21 of 1950. Appendix C, *infra*, contains extracts from Reorganization Plan No. 21, setting forth the respective functions of the Board and Administration.

The Shipping Act, 1916, created the United States Shipping Board, succeeded by the United States Shipping Board Bureau in 1933, under Executive Order of June 10, 1933, No. 6166, § 12, in turn succeeded by the Maritime Commission under the Merchant Marine Act, 1936.

Congress and agency officials (Appendix E); (4) the only judicially reviewable orders entered by the Maritime Administration are under the Merchant Marine Act, 1936; and (5) in any event, orders granting and denying relief under the 1936 Act are "entered under *authority* of the Shipping Act, 1916, as amended."[2]

2. Whether orders of the Maritime Administration are immune from review under the Review Act, notwithstanding that it expressly provides for review of "orders . . . of the Maritime Administration".

3. Whether orders entered by the Federal Maritime Board and Maritime Administration in rule-making proceedings involving provisions of the Shipping Act, 1916, are immune from review under the Review Act, notwithstanding the express provision in the Review Act for review of orders "entered under authority of the Shipping Act, 1916, as amended".

STATUTES INVOLVED

The statute principally involved is section 2 of the Review Act of 1950 (5 U.S.C. §§ 1031-1042) (also known as the Hobbs Act), set forth in Appendix A. Appendix A also includes sections 204, 805(a), 903 and 904 of the Merchant Marine Act, 1936 (46 U.S.C. §§ 1101-1294), and sections 23 and 31 of the Shipping Act, 1916 (46 U.S.C. §§ 801-842).

STATEMENT OF THE CASE

PFEL, a steamship company, applied for permission under section 805(a), Merchant Marine Act, 1936, to operate a new steamship service with unsubsidized vessels in domestic trade between the Pacific Coast of

[2] Emphasis has been supplied throughout this petition.

the United States and Hawaii (R. 639). Section 805(a), which is a "public interest and convenience" type statute, requires that any company who is a party to an operating-differential subsidy agreement under Title VI, Merchant Marine Act, 1936, or any affiliate, must obtain such permission prior to engaging in domestic trade operations. PFEL is a party to such an agreement with respect to a service in the foreign trade of the United States between California and Far East ports, which service is wholly separate from its proposed domestic Hawaii service (R. 3-5).

Pursuant to section 805(a), a statutory hearing was held upon PFEL's application by a Hearing Examiner of the Federal Maritime Board (R. 639). The application was opposed principally by intervener Matson Navigation Company ("Matson"), which has an approximately 98 percent monopoly of the cargo shipped between the Pacific Coast and Hawaii, and an almost complete monopoly of trade between the Atlantic and Gulf Coasts and Hawaii (under a pooling agreement with another carrier), and which is intimately related, by ownership and otherwise, with four of the so-called "Big Five", which are the dominant economic interests in Hawaii (R. 7, 9, 24-26, 637). Matson itself is a subsidized operator and subject to the restrictions of section 805(a), because it wholly owns Oceanic Steamship Company, which holds an operating-differential subsidy agreement for foreign trade operations between the Pacific Coast and Australia New Zealand. Matson itself manages and operates the Oceanic service. Matson nevertheless alleged that it was entitled to the special protection against competition afforded an "exclusively" domestic operator under section 805(a), and that PFEL's new service

would result in "unfair competition" to Matson, within the meaning of section 805(a) (R. 11, 13, 34).

The Examiner, after extensive hearings, held that PFEL's proposed service would not result in unfair competition to Matson, entered findings favorable to PFEL, including the finding that PFEL derived no benefit from subsidy not available to Matson through its own subsidized operations, and strongly recommended that PFEL's application be granted, as did also the Board's staff which actively participated in the proceeding as "Public Counsel" (R. 22-35). However, in a joint report served on May 14, 1957, the Board, by a two-to-one vote, and the Maritime Administrator,[3] rejected the Examiner's principal findings and recommendation, held that Matson was entitled to the special protection of an "exclusively" domestic operator under section 805(a), and that PFEL's competition would be "unfair" to Matson (R. 1-21).

PFEL thereupon filed its petition for review by the Court of Appeals for the District of Columbia, alleging jurisdiction under the Review Act of 1950 (R. 629-636). PFEL alleged, *inter alia*, that as a matter of law (1) Matson was not entitled to the special protection of an "exclusively" domestic trade operator under section 805(a), because of its subsidized operations; (2) the Board and Administration arbitrarily rejected the Examiner's findings and recommendation, without giving due weight thereto or any statement of reasons for its disagreement with those findings; (3) the critical findings upon which the Board and Administration purported to base their decision were

[3] The Chairman of the Federal Maritime Board is *ex officio* Maritime Administrator and head of the Maritime Administration.

not supported by substantial evidence; and (4) the Board and Administration failed to consider or make findings upon material issues, including the repugnancy of Matson's operations to the antitrust laws of the United States.

Because it had never been decided whether jurisdiction to review such agency action was in the Court of Appeals under the Review Act of 1950, or in the District Courts, PFEL also instituted a proceeding in the United States District Court for the District of Columbia.[4] That proceeding is pending in the District Court.

In the Court of Appeals proceeding, which is subject of the instant petition, respondents Board and Administration moved to dismiss the petition for review on the ground that orders under the Merchant Marine Act, 1936, are not subject to review by the Courts of Appeals under the Review Act. Concurrently in their answer filed in the District Court proceeding, they contended their action was not reviewable by any court.[5] Their declared strategy therefore is to defeat any judicial review whatever of their actions under the Merchant Marine Act, 1936. If this strategy is successful, they will have insulated from judicial review what is probably by far the greater portion of their activity.

Respondent United States concurred in the Board's motion to dismiss in the Court of Appeals, as did

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[4] Pacific Far East Line, Inc. v. Federal Maritime Board, et al., Civil Action No. 1708-57.

[5] *Id.*, Defendant's Answer, Fifth Defense; also Matson's Answer, Sixth Defense.

Matson, which had intervened in that proceeding. On October 11, 1957, the Court of Appeals, by Judges Prettyman and Burger and Chief Judge Edgerton, denied those motions, without prejudice to renewal at the hearing upon the merits (R. 637). The Board and Administration renewed their jurisdictional arguments at the hearing on the merits and Matson again concurred therein. Respondent United States admitted that the action of the Federal Maritime Board and Maritime Administration in denying PFEL's application was unlawful and ought to be reversed, but urged that jurisdiction in the first instance was in the district court.[6]

On May 1, 1958, the Court of Appeals by a second panel (Judges Miller and Bastian, and Chief Judge Edgerton) dismissed PFEL's petition for review for lack of jurisdiction, without reaching any consideration of the merits of the petition (R. 638-641). The Court, after preliminary recitals, stated only:

> "PFEL appeals from an order entered under authority of the Merchant Marine Act, 1936. It seems clear, from a 'plain meaning' reading thereof, that the Judicial Review Act of 1950 does not vest this court with jurisdiction to review this order, certainly not in the first instance. We do not find that this produces an unreasonable result, or one plainly at variance with the policy of the legislation as a whole, or that legislative history requires a different interpretation. Cf. *United States* v. *American Trucking Assn's*, 310 U.S. 534, 543.
>
> "PFEL has filed a companion suit in the District Court seeking review of the same order. We

[6] Addendum to Brief of Respondent United States in the proceeding below.

of course, express no opinion as to the jurisdiction of that court" (R. 640-641).

The Court did not otherwise discuss or refer to PFEL's contentions or to the very considerable evidence in support thereof.

REASONS FOR GRANTING THE WRIT

This case presents questions of substantial public interest which warrant review by this Court. In express terms and in effect the decision below exempts from review under the Review Act of 1950 (1) all orders under the Merchant Marine Act, 1936, the administration of which comprises the principal activity of the Board and Administration; (2) all orders of the Maritime Administration, notwithstanding the express provision in the Review Act for review of "orders of the . . . Maritime Administration"; and (3) all orders entered by the Board pursuant to its general rule making power, including those with respect to the substantive provisions of the Shipping Act, 1916, notwithstanding the express provisions in the Review Act for review of orders "entered under authority of the Shipping Act, 1916, as amended." Moreover, under the decision below, the Board and Administration have achieved one branch of their declared two-pronged objective to completely immunize from judicial supervision all of their actions under the Merchant Marine Act, 1936[7]—including action

[7] The Board derives its general rule-making authority from section 204, Merchant Marine Act, 1936. In the Matter of the Notice of Proposed Rule Making—Business Practices of Freight Forwarders [46 C.F.R. Part 244], Report of the Federal Maritime Board on Petition to Dismiss, served August 21, 1957, Letter pages 2-3.

which, in this instance, the Department of Justice has categorically asserted were unlawful.

The holding by the Court of Appeals that the Review Act of 1950 "plainly" does not authorize review of orders under the Merchant Marine Act, 1936, was erroneous and in conflict with compelling evidence to the contrary.

The objectives of Congress in enacting the Review Act included provision for a uniform procedure for review in the Courts of Appeals of orders of the various agencies specified, including the former Maritime Commission, the Federal Maritime Board, and the Maritime Administration. Senate Report No. 2618, 81st Cong., 2d Sess. (1950), stated:

> "At present the method of review of most judicially reviewable orders of the agencies involved in the proposed bill is prescribed by many provisions scattered throughout different statutes . . . The proposed bill confers jurisdiction upon the circuit courts of appeals to review the orders of the agencies named" (page 3).

The Board and Administration urged below and presumably the Court of Appeals concurred in the highly technical construction that the Review Act in terms refers only to the "Shipping Act, 1916, as amended", and therefore does not apply to the integrally related Merchant Marine Act, 1936. But the 1936 Act in fact is included in the 1916 Act, "as amended". The 1936 Act not only amends the basic shipping laws of the United States first enacted in the Shipping Act, 1916,[8] but it also expressly amends the 1916 Act in

[8] For example, see Preamble, Shipping Act, 1916, 39 Stat. 728; Preamble, Merchant Marine Act, 1936, 49 Stat. 1985; section 101, Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. § 1101.

numerous detailed respects. For example, sections 204 and 904 of the 1936 Act amend the 1916 Act generally by substituting the Maritime Commission for its predecessors, the Shipping Board and Shipping Board Bureau, and by transferring to the Commission each of the functions, powers and duties formerly vested in its predecessors. The 1936 Act also amends the 1916 Act by repealing sections 3, 4, 5, 6, 7, 8, 10, 11, 35, and 43 thereof.[9] Section 903(b) of the 1936 Act also amends section 3 of the Intercoastal Shipping Act, 1933, which is likewise part of the "Shipping Act, 1916, as amended". See the preamble to the 1933 Act (47 Stat. 1425, approved March 3, 1933). And section 204 of the 1936 Act, as elsewhere herein noted, empowered the Commission, and hence the Board and Administration, to promulgate rules and regulations under the provisions of the 1916 Act.

While the terms "Shipping Act" and "Merchant Marine Act" are frequently separately employed, Appendix E, *infra*, proves that there has nevertheless been considerable inconsistency, overlapping and interchange in terminology, both by Congress and by agency officials. The Chairman of the Board has himself referred to the 1936 Act as one of the "shipping acts", as has the Congress (Appendix E). The Court of Appeals thus unjustifiably held Congress to a far greater degree of precision in language than Congress and the Board have hitherto employed.

It is plain from the very language of the Review Act that Congress covered the Merchant Marine Act, 1936, in its reference to the "Shipping Act, 1916, as amended", since it expressly included in the Re-

[9] See section 903 of the 1936 Act.

view Act "orders . . . of the Maritime Administration". The only reviewable orders issued by the Maritime Administration are those issued under the Merchant Marine Act, 1936. The Maritime Administration's functions under the 1916 Act (if the 1936 Act be excluded) are confined to sections 9, 37-40, 42, all of which relate to the sale or transfer of vessels from U. S.-flag ownership or registry to foreign-flag ownership or registry, and none of which have ever been held to be reviewable.[10] The unnecessarily technical and narrow construction below, therefore, in effect judicially repeals the specific provision in the Review Act for review of "orders . . . of the Maritime Administration". To give the quoted language any meaning, the Review Act must be construed to cover 1936 Act orders.

The legislative history of the Review Act also demonstrates that orders under the 1936 Act were covered thereby. See Appendix D, *infra*. During legislative consideration of the Review Act, two representatives of the Maritime Commission repeatedly urged that the Act should apply to "all reviewable orders" of the Maritime Commission. They proposed language the "minimum effect" of which they represented "should be the substitution of the new procedure for the old with respect to all reviewable orders of the Commission" (Hearings before Subcommittee Nos. 3 and 4 of

[10] The Federal Maritime Board and Maritime Administration unqualifiedly assert that the exercise of such functions is not judicially reviewable. Thus, their brief below at pages 11-16 states that orders "fraught with discretion, business judgment, considerations of international and defense policy and other purely executive concerns", as orders under sections 9, 37, 40-42 clearly are, are not subject to judicial review.

the House Committee on the Judiciary on H. R. 1468, H. R. 1470, and H. R. 2271, 80th Congress, and before Subcommittee No. 2 on H. R. 2915 and H. R. 2916, 81st Congress ("Providing for the Review of Orders of Certain Agencies, etc.")). Congress adopted this language verbatim.

Had Congress intended to exclude judicially reviewable orders under the Merchant Marine Act, 1936, from coverage of the Review Act, some reason for such exclusion would logically be expected. No reason therefor is to be found in the legislative history.

But even assuming, *arguendo*, that the narrow construction below was proper, *i.e.*, that the 1936 Act is not part of the "Shipping Act, 1916, as amended", nevertheless the holding of the Court of Appeals that it lacked jurisdiction was still erroneous. Thus, the Review Act provides for review of orders "entered under *authority* of the Shipping Act, 1916, as amended". Orders granting or denying relief under the 1936 Act are "entered under authority of the Shipping Act, 1916, as amended", because they are subject to section 23 of the 1916 Act, as amended.[11] See also section 31 of the 1916 Act.

Finally, the holding below is germinating the seed of conflict. In *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864, 869, note 6a (1953), the Ninth Circuit suggested, without deciding, that the reference in the Review Act to orders of the Maritime Administration

[11] Section 23 provides in part that "All orders . . . under this Act, as amended or *supplemented*, shall continue in force until its further order, or for a specified period, as shall be prescribed in the order . . ."

contemplated review by the Courts of Appeals far broader than (but including) the review sought below by petitioner.

Until the questions presented are definitively resolved, they will be present in practically every future proceeding in which judicial review is sought of agency action under the Merchant Marine Act, 1936, or of any agency action by the Maritime Administration, or of any action pursuant to the Board's general rule-making powers. A party aggrieved by agency action under the Merchant Marine Act, 1936, can fully protect its right to review only by instituting duplicate proceedings in both the Court of Appeals under the Review Act and in the District Court—which, from the standpoint of the courts, the agencies and private litigants, is a costly and wholly wasteful procedure.

CONCLUSION

In view of the foregoing, petitioner respectfully urges that the writ be granted.

Respectfully submitted.

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APPENDIX A

Statutes Involved

Review Act of 1950 (5 U.S.C. §§1031-1042)

"SEC. 2 [5 U.S.C. § 1032]. The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402(a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309(e) and 317 of the Packers and Stockyards Act and section 7(a) of the Perishable Agriculture Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

"Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof."

Merchant Marine Act, 1936 (46 U.S.C. §§1101-1294)

"SEC. 240 [46 U.S.C. § 1114]. (a) All the functions, powers, and duties vested in the former United States Shipping Board by the Shipping Act, 1916, the Merchant Marine Act, 1920, the Merchant Marine Act, 1928, the Intercoastal Shipping Act, 1933, and amendments to those Acts, and now vested in the Department of Commerce pursuant to section 12 of the President's Executive order of June 10, 1933, are hereby transferred to the United States Maritime Commission: *Provided, however*, That

after the date of the passage of this Act no further construction loans shall be made under the provisions of section 11 of the Merchant Marine Act, 1920, as amended.

"(b) The Commission is hereby authorized to adopt all necessary rules and regulations to carry out the powers, duties, and functions vested in it by this Act.

"(c) The orders issued by the United States Maritime Commission in the exercise of the powers transferred to it by this title shall be enforced in the same manner as heretofore provided by law for enforcement of the orders issued by the former United States Shipping Board, and violation of such orders shall subject the persons or corporation guilty of such violation to the same penalties or punishment as heretofore provided for violation of the orders of said Board.

* * *

"SEC. 805 [46 U.S.C. § 1223]. (a) It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commision finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that

it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

"If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

* * *

"SEC. 903. [49 Stat. 2016]. The following Acts and parts of Acts shall stand repealed:

(a) All of the provisions of sections 3 to 8, inclusive, section 10, section 11, section 35, and section 43 of the Shipping Act, 1916, as amended.

(b) All of the provisions of subsection (b)(4) of section 2, section 3, section 11, section 14, and section 35 of the Merchant Marine Act, 1920, as amended.

(c) All of the provisions of sections 201, 301, 302, 401 to 413, inclusive, 601, and 702 of the Merchant Marine Act, 1928, as amended: *Provided*, That any contract lawfully

entered into under authority of sections 401 to 413, inclusive, of such Act shall remain in full force and effect as though these sections were not repealed, subject, however, to the further provisions of this Act.

(d) The last sentence in section 3 of the Intercoastal Shipping Act, 1933."

"SEC. 904. [46 U.S.C. § 1243]. Whenever the words 'United States Shipping Board' or the words 'the Board' are used in any prior Act, such Acts are hereby amended so that such words shall be applicable to the United States Maritime Commission."

Shipping Act, 1916 (46 U.S.C. §§ 801-842)

"SEC. 23 [46 U.S.C. § 822]. Orders of the board relating to any violation of this Act shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

"All orders of the United States Maritime Commission, other than for the payment of money, made under this Act, as amended or supplemented, shall continue in force until its further order, or for a specified period of time, as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

* * *

"SEC. 31 [46 U.S.C. § 830]. That the venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the board shall, except as herein otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties."

APPENDIX B

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,007

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, and CLARENCE G. MORSE, Maritime Administrator, RESPONDENTS

MATSON NAVIGATION COMPANY, INTERVENOR

On Petition for Review of Order of the Federal Maritime Board and Maritime Administrator

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Decided May 1, 1958

Mr. Odell Kominers, with whom *Mr. J. Alton Boyer* was on the brief, for petitioner. *Mr. John C. Wren* also entered an appearance for petitioner.

Mr. Daniel M. Friedman, Attorney, Department of Justice, for respondent, United States of America.

Mr. Edward Aptaker, Chief, Regulations Branch, Federal Maritime Board, with whom *Messrs. Robert E. Mitchell*, Assistant General Counsel, Federal Maritime Board, and *Edward Schmeltzer*, Attorney, Federal Maritime Board, were on the brief, for respondents, Federal Maritime Board, Maritime Administration, and Clarence G. Morse, Maritime Administrator.

Mr. Alvin J. Rockwell, with whom *Mr. Willis R. Deming* was on the brief, for intervenor.

Before EDGERTON, Chief Judge, and WILBUR K. MILLER and BASTIAN, Circuit Judges.

PER CURIAM: This is a petition to review an order of the Federal Maritime Board (Board) and the Maritime Administrator (Administrator) entered under Section 805 (a) of the Merchant Marine Act of 1936, 46 U.S.C. § 1223, denying the application of Pacific Far East Line, Inc. (PFEL), filed in 1954 pursuant to the Act,[1] for its unsubsidized vessels to transport cargo in domestic trade between the West Coast of the United States and Hawaii. Extensive hearings on the application were held before an examiner. Matson Navigation Company (Matson), intervenor herein, a company presently carrying 98% of the cargo being shipped between the West Coast and Hawaii, opposed the application. The examiner recommended granting PFEL's application but the Board and the Administrator reversed and denied PFEL's application, holding that such service would be "unfair competition" to Matson. Petitioner thereupon sought review in this court.

PFEL claims, among other things, that this court has jurisdiction under the Judicial Review Act of 1950, 64 STAT. 1129, as amended, 5 U.S.C. §§ 1031-42, to review the order denying the application. Section 2 of the Act provides in relevant part as follows:

> "The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . such final orders of the United States Maritime Commission or

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[1] Under Section 805 (a) it is unlawful, without the Board's written permission, to pay a subsidy to any contractor engaged in foreign commerce if such contractor is also engaged in domestic coastwise service. This section further provides that the Board "shall not grant any such application" which it finds "will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act."

the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section [31, Shipping Act, 1916, as amended]."

Section 31 of the Shipping Act of 1916, as amended, 46 U.S.C. § 830, provides:

"The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties."

PFEL contends that the Merchant Marine Act of 1936 is part of the Shipping Act of 1916, as amended within the meaning of the Judicial Review Act of 1950, and that orders issued under the Merchant Marine Act were "entered under the authority of the Shipping Act, 1916, as amended." Therefore, petitioner believes this court has jurisdiction to review the order in this case. We reach a contrary conclusion.

Section 2 of the Judicial Review Act of 1950 on its face limits the jurisdiction of this court to review "such final orders of the . . . Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of Section 31, Shipping Act, 1916, as amended." No other statute is mentioned. PFEL appeals from an order entered under authority of the Merchant Marine Act, 1936. It seems clear, from a "plain meaning" reading thereof, that the Judicial Review Act of 1950 does not vest this court with jurisdiction to review this order, certainly not in the

first instance. We do not find that this produces an unreasonable result, or one plainly at variance with the policy of the legislation as a whole, or that legislative history requires a different interpretation. *Cf. United States* v. *American Trucking Assn's*, 310 U.S. 534, 543.

PFEL has filed a companion suit in the District Court seeking review of the same order. We, of course, express no opinion as to the jurisdiction of that court.

The petition for review will be dismissed for lack of jurisdiction.

Dismissed

APPENDIX C

Reorganization Plan No. 21 of 1950

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949

PART I. FEDERAL MARITIME BOARD

SECTION 101. *Creation of Federal Maritime Board.*—There is hereby established a Federal Maritime Board, hereinafter referred to as the Board.

* * *

SEC. 104. *Transfer of regulatory functions to the Board.*—The following functions of the United States Maritime Commission are hereby transferred to the Board:

(1) All functions under the provisions of sections 14 to 20, inclusive, and sections 22 to 33, inclusive, of the Shipping Act, 1916, as amended (46 U.S.C. 812-819 and 821-832), including such functions with respect to the regulation and control of rates, services, practices, and agreements of common carriers by water and of other persons

(2) All functions with respect to the regulation and control of rates, fares, charges, classifications, tariffs, regulations, and practices of common carriers by water under the provisions of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. 843-848).

(3) The functions with respect to the making of rules and regulations affecting shipping in the foreign trade to adjust or meet conditions unfavorable to such shipping, and with respect to the approval, suspension, modification, or annulment of rules or regulations of other Federal agencies affecting shipping in the foreign trade, under the provisions of section 19 of the Merchant Marine Act, 1920, as amended (46 U.S.C. 876), exclusive of subsection (1) (a) thereof.

(4) The functions with respect to investigating discriminatory rates, charges, classifications, and practices in the foreign trade, and with respect to recommending legislation to correct such discrimination, under the provisions of section 212 (e) of the Merchant Marine Act, 1936 (46 U.S.C. 1122 (e)).

(5) So much of the functions with respect to requiring the filing of reports, accounts, records, rates, charges, and memoranda, under the provisions of section 21 of the Shipping Act, 1916, as amended (46 U.S.C. 820), as relates to the functions of the Board under the provisions of sections 104 (1) to 104 (4), inclusive, of this reorganization plan.

SEC. 105. *Transfer or subsidy award and other functions to the Board.*—The following functions of the United States Maritime Commission are hereby transferred to the Board:

* * *

(3) All functions under the provisions of section 12 of the Shipping Act, 1916, as amended (46 U.S.C. 811), including such functions with respect to making investigations and reports on relative costs and on marine insurance.

(4) So much of the functions with respect to requiring the filing of reports, accounts, records, rates, charges, and memoranda, under the provisions of section 21 of the Shipping Act, 1916, as amended (46 U.S.C. 820), as relates to the functions of the Board under the provisions of sections 105 (1) to 105 (3), inclusive, of this reorganization plan.

* * *

Part II. Maritime Administration

Section 201. *Creation of Maritime Administration.* There is hereby established in the Department of Commerce a Maritime Administration.

Sec. 202. *Maritime Administrator.*—There shall be at the head of the Maritime Administration a Maritime Administrator, hereinafter referred to as the Administrator. The chairman provided for in section 102 of this reorganization plan shall, ex officio, be the Administrator. The Administrator shall perform such duties as the Secretary of Commerce shall prescribe.

* * *

Sec. 204. *Transfer of functions.*—Except as otherwise provided in part I of this reorganization plan, all functions of the United States Maritime Commission and of the Chairman of said Commission are hereby transferred to the Secretary of Commerce. The Secretary of Commerce may from time to time make such provisions as he shall deem appropriate authorizing the performance by the Maritime Administrator of any function transferred to such Secretary by the provisions of this reorganization plan.

Part III. General Provisions

* * *

Sec. 306. *Abolition of Maritime Commission.*—The United States Maritime Commission, including the offices of the members of the Commission, is hereby abolished.

and the Secretary of Commerce shall provide for the termination of any outstanding affairs of the Commission not otherwise provided for in this reorganization plan.

* * *

APPENDIX D

Summary of the Legislative History of the Review Act of 1950

Congress intended in the Review Act of 1950 (1) "To relieve the Supreme Court from the burden of hearing appeals as of right", as under the Urgent Deficiencies Act; (2) "To provide a review as of right in an appellate court, that is in a circuit court of appeals"; (3) "To provide for review on certiorari in the Supreme Court"; and (4) To standardize and "improve the procedure on review", of orders of the agencies named therein.[1] H. R. 2916, 81st Congress, 1st Session, a predecessor bill of that enacted as the Review Act of 1950, proposed that the courts of appeals would have jurisdiction to review only orders entered under authority of "sections 15, 17, 18 and 19 of the Shipping Act, 1916, as amended . . .; and sections 3 and 4 of the Intercoastal Shipping Act, as amended . . .". However, on March 10, 1949, Paul D. Page, Jr., Solicitor, Maritime Commission, testified before a subcommittee of the House Judiciary Committee:[2]

> "There are two particulars in which we feel that the act as drawn can be helped by amendment. The first is that we do not feel it is sufficiently all-inclusive. *We have never taken the position that any of our orders are not reviewable. We advocate judicial review of our orders.*

---

[1] Hearings before Subcommittee Nos. 3 and 4 of the Committee on the Judiciary, House of Representatives, on H. R. 1468, H. R. 1470, and H. R. 2271, 80th Congress, and before Subcommittee No. 2 on H. R. 2915 and H. R. 2916, 81st Congress ("Providing for the Review of Orders of Certain Agencies, etc."), page 90.

[2] *Id.*, page 137.

"The act as drawn specifies appeals from orders made under certain sections of our act. It omits the section under which a vast majority of our orders are issued, section 22 of the Shipping Act, 1916, and we feel, and this is shown in our written report, and I will not elaborate upon it, that *the provisions of this act should apply to all reviewable orders of the Maritime Commission*".

On April 1, 1949, Mr. Page further testified (149-50):

"MR. PAGE. Mr. Chairman, as it stood at the last hearing we were somewhat *fearful that the bill would have precluded review of some cases*, and there might also have been some confusion as to whether it conflicted with the specific provisions for review in the Shipping Act and possibly certain provisions in the Administrative Procedure Act.

Between Mr. Tolman and Judge Phillips' committee we have agreed upon an amendment which we feel *prevents any such possibility* . . .

The Chairman of the Maritime Commission similarly advised the subcommittee:

"In the opinion of the Commission, however, the provisions of the bill should be sharpened so as to make clear that the new procedure shall apply to *reviewable orders* of the regulatory agencies involved . . .

"As now written, the bill applies to Maritime Commission orders issued under sections 15, 17, 18, and 22 of the Shipping Act, 1916 (46 U.S.C., Secs. 814-815, 817-818) and sections 3 and 4 of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. secs. 845 and 845a). *The Commission issues other reviewable orders.* In view of the prime purpose of the bill it seems clear that *its minimum effect should be the substitution of the new procedure for the old with respect to all reviewable orders of the Commission*. As it stands the bill would not apply to orders other than those issued under the specified sections of the Shipping Act, 1916, and the Intercoastal Shipping Act

1933, and while the Commission has not been able to make a statistical investigation to ascertain the number of orders issued under various sections of the acts administered by the Commission, it can be definitely stated that the largest number of important regulatory orders which the Commission issues comes under section 22 of the Shipping Act, 1916. The bill as written would not alter existing procedure as to such orders, and therefore would clearly fail in its purpose of reducing the work load of the Supreme Court as much as possible.

"This suggestion in no way advocates that the bill be so drafted as to confer rights to review in addition to those now authorized by law, but is designed to secure uniform procedure with respect to *all reviewable orders*" (page 145).

* * * *

"Summarizing, the Maritime Commission agrees with the primary objective of the bill. It suggests amendment to the bill as heretofore indicated in order to make the procedure set out more effective, by making it cover *all reviewable orders*, and by insuring to the Maritime Commission and like agencies full and independent representation in the courts" (page 147).

The amendment proposed by Mr. Page and the Commission's Chairman was precisely that adopted in the final Act. Thus, the legislative history of the Review Act is conclusive evidence of an overriding intention by Congress that the Review Act should embrace *all* judicially reviewable orders—and Congress adopted *verbatim* the language which the Maritime Commission advised it would accomplish that end. Nowhere was there any indication of an intention to exclude orders relating to the 1936 Act.

The legislative history of the Review Act proves also that the inclusion by Congress of orders of the Maritime Administration was a deliberate and meaningful act. H. R. 5487, the bill which became the Review Act, was reported by the House Judiciary Committee in May, 1950 (H. Rept.

2122, 81st Cong., 2d Sess. (1950)). As reported, it referred only to the Maritime Commission. However, also in May, 1950, the Maritime Commission was succeeded by the Federal Maritime Board and Maritime Administration under Reorganization Plan No. 21 (Appendix C). On June 6, 1950, H. R. 5487 was amended in the House also to include orders of the newly created Federal Maritime Board, but not the Administration; and it so passed the House (96 Cong. Rec. 8066-8068).

On December 11, 1950, prior to its enactment, when the Senate Judiciary Committee favorably reported the House bill, it proposed also to add orders of the Maritime Administration (S. Rept. 2618, 81st Cong., 2d Sess.). On December 15, the Senate adopted that proposal and expressly amended the bill to add orders of the Maritime Administration (96 Cong. Rec. 16,626-16,627). On December 18 the matter again came before the House, which reconsidered and approved the Senate amendment (96 Cong. Rec. 16,728). Thus, seven months after the Reorganization Plan went into effect, and six months after H. R. 5487 was amended to add the Federal Maritime Board, it was further extended to include orders of the Maritime Administration, and that extension was specifically considered and approved on three separate occasions—by the Senate Judiciary Committee, by the full Senate, and by the House of Representatives.

APPENDIX E

Terminology Employed to Describe the Various Laws Administered by the Federal Maritime Board and Maritime Administration

The laws administered by the Maritime agencies include

Shipping Act, 1916	(46 U.S.C. §§ 801-842
Merchant Marine Act, 1920	(46 U.S.C. §§ 861-889
Merchant Marine Act, 1928	(46 U.S.C. §§ 891-891h
Intercoastal Shipping Act, 1933	(46 U.S.C. §§ 843-845
Merchant Marine Act, 1936	(46 U.S.C. §§ 1101-1294

Although the above descriptions are frequently separately employed, there has also been considerable inconsistency, overlapping, and interchange both in the Congress and by the agencies.

1. The term "Shipping Act, 1916" was not employed in the original 1916 Act. It did not become so known until amendments thereto enacted as Public Law 198, 65th Congress, approved July 15, 1918, 40 Stat. 900.

2. The preamble to the 1933 Act stated that it was "an Act amending the Shipping Act, 1916, as amended . . .", but was nevertheless given a separate designation, *i.e.*, "Intercoastal Shipping Act, 1933". The 1916 Act was also amended by the 1920, 1928, and 1936 Acts, which nevertheless were also given separate designations.

3. The Report to the Select Committee to Investigate the Executive Agencies of the Government, pursuant to S. Res. 217 (74th Cong.), No. 12, Report on the Government Activities in the Field of Transportation (75th Cong., 1st Sess., 1937), page 50, referred to the Shipping Act, 1916, as the "Merchant Marine Act, 1916"; at page 95 it referred to the 1916 Act and the Merchant Marine Act, 1920, as the "Shipping Acts of 1916 and 1920".

4. The Task Force Report on Regulatory Commissions [Appendix N], prepared for the Commission on Organization of the Executive Branch of the Government, January, 1949, page 67, referred to the 1936 Act as the "Maritime Act of 1936". So also did the Chairman of the Merchant Marine Subcommittee of the Senate Interstate and Foreign Commerce Committee in Hearings on S. 1516, 76th Cong., 1st Sess. (1939), page 35.

5. In testimony before a House subcommittee of the Committee on Appropriations upon the Independent Offices Appropriation Bill for 1948, 80th Cong., 1st Sess. (1947), Part 2, page 907, the Director of the Budget Division of

the Maritime Commission referred to "the Merchant Marine Act of 1936, and other shipping statutes".

6. The Report of the President's Advisory Committee on the Merchant Marine, November 1947, page 61, refers to the Merchant Marine Act, 1920, as the "Shipping Act of 1920".

7. S. Rept. 2494, 81st Cong., 2d Sess. (1950), Final Report of the Senate Committee on Interstate and Foreign Commerce, pursuant to S. Res. 50 ("Merchant Marine Study and Investigation"), referred at page 69 to "the 1916, 1920, 1928, and 1936 Merchant Marine Acts". At page 91 it recommended that "the Merchant Marine Acts of 1916, 1920, 1928, 1936, 1946 and the Intercoastal Shipping Act of 1933" be codified under a single statute. At page 84 it again referred to "The Merchant Marine Act of 1936, as amended".

8. In *Meacham Corp. v. United States*, 207 F. 2d 535, 537 (4th Cir. 1953), the Court having previously referred to the Shipping Act, 1916, then referred to the Merchant Marine Act, 1920 as "the amendatory Act of 1920".

9. Former Chairman Gatov of the Federal Maritime Board referred to the Merchant Marine Act, 1936, as the "Shipping Act of 1936". Hearings before a Subcommittee of the House Committee on Appropriations on H. R. 4577 ("Departments of State, Justice, and Commerce Appropriations for 1954"), 83d Cong., 1st Sess. (1953), page 387.

10. The Preliminary Report of the Special Subcommittee to Study Maritime Subsidy Program, Senate Interstate and Foreign Commerce Committee, 83d Cong., 2d Sess. (1954), page 1, referred to the "Merchant Marine Act, 1936, as amended and other shipping acts" and to "our national shipping laws".

11. In the Hearings of the Senate Interstate and Foreign Commerce Committee, 83d Cong., 2d Sess. (1954

Part I, pursuant to S. Res. 173, page 4. Former Chairman Rothschild of the Federal Maritime Board referred to the "Shipping Act 1916 and related merchant marine laws".

12. The present Chairman of the Federal Maritime Board and Maritime Administrator, Mr. Morse, has himself referred to the Merchant Marine Act, 1936, as one of the "shipping acts". Hearings before the House Appropriations Committee on "Department of Commerce and Related Agencies Appropriations for 1956", 84th Cong., 1st Sess. (1955), page 471.

13. Chairman Morse has also referred to the Merchant Marine Acts of 1920 and 1928 as "the Shipping Acts of . . . 1920 [and] 1928, . . .". Hearings on H. R. 5734, House Committee on Merchant Marine and Fisheries, 84th Cong., 1st Sess. (1955), page 4 ("Labor-Management Problems of the American Merchant Marine"). He has also referred to the 1916 Act as "the *first* comprehensive Shipping Act in 1916", and to "the Shipping Act, 1916, and related merchant marine laws". Hearings before the House Committee on Merchant Marine and Fisheries, 85th Cong., 1st Sess. (1957) ("Study of Vessel Transfer, Trade-In and Reserve Fleet Policies"), pages 53, 55.

14. The Senate Interstate and Foreign Commerce Committee has referred to the Shipping Act, 1916, as amended, as the "Merchant Marine Act of 1916, as amended". S. Rept. 1709, 85th Cong., 2d Sess. (June 13, 1958), page 4, quoting from S. Rept. 2494, 81st Cong., 2d Sess. (1950).

In view of the above, petitioner submits that the Court of Appeals clearly erred in summarily holding that upon a "plain meaning reading" the term "Shipping Act 1916, as amended" could not have been intended to include the "Merchant Marine Act, 1936."

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No. 319

In the Supreme Court of the United States

OCTOBER TERM, 1958

PACIFIC FAR EAST LINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL MARITIME BOARD IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 5a–8a) is reported at 255 F. 2d 182.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1958 (R. 638), and a timely petition for rehearing was denied on June 5, 1958 (R. 666–7). The petition for a writ of certiorari was filed on August 28, 1958. The jurisdiction of this Court is invoked under 5 U. S. C. 1040 and 28 U. S. C. 1254 (1).

QUESTION PRESENTED

5 U. S. C. 1032 gives courts of appeals jurisdiction to review final orders of the Federal Maritime Board "entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended." The question presented is whether courts of appeals also have jurisdiction under this Section to review Board orders entered under authority of the Merchant Marine Act, 1936.

STATUTES INVOLVED

Section 2 of the Act of December 29, 1950, 64 Stat. 1129, 5 U. S. C. 1032, commonly known as the Judicial Review Act of 1950, provides as follows:

> The court of appeals shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of, all final orders (a) of the Federal Communications Commission made reviewable in accordance with the provisions of section 402 (a) of the Communications Act of 1934, as amended, and (b) of the Secretary of Agriculture made under the Packers and Stockyards Act, 1921, as amended, and under the Perishable Agricultural Commodities Act, 1930, as amended, except orders issued under sections 309 (e) and 317 of the Packers and Stockyards Act and section 7 (a) of the Perishable Agricultural Commodities Act, and (c) such final orders of the United States Maritime Commission or the Federal Maritime Board or the Maritime Administration entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, as are now subject to judicial review pursuant to the provisions of section 31, Shipping Act, 1916, as amended.

Such jurisdiction shall be invoked by the filing of a petition as provided in section 4 hereof.

Section 805 (a) of the Merchant Marine Act, 1936, 49 Stat. 2012, 46 U. S. C. 1223 (a), provides as follows:

> It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in

bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

STATEMENT

Petitioner filed in the Court of Appeals for the District of Columbia Circuit a petition to review an order of the Federal Maritime Board,[1] entered under Section 805 (a) of the Merchant Marine Act, 1936 (46

[1] The order was issued by the Board and the Maritime Administrator (who is also the Chairman of the Board). They are collectively referred to as "the Board."

U. S. C. 1223 (a)), which denied petitioner's application for its unsubsidized vessels to operate in the Pacific Coast-Hawaii trade.[2] The petition was filed pursuant to 5 U. S. C. 1032, which confers upon courts of appeals jurisdiction to review final orders of the Board "entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended." Simultaneously, petitioner filed a complaint in the district court for review of the same order. *Pacific Far East Line, Inc.* v. *Federal Maritime Board, et al.*, D. D. C., Civ. No. 1708–57.

On the Board's motion, in which the United States (a statutory respondent) and Matson Navigation Company (an intervenor) concurred,[3] the court of appeals unanimously dismissed the petition for want of jurisdiction.[4] The court held (Pet. 7a–8a) that it was "clear, from a 'plain meaning' reading" of 5 U. S. C. 1032 that the grant of jurisdiction to review Board

[2] Section 805 (a) prohibits, without the Board's written permission, the payment of subsidy to any person who owns, operates or charters any vessels enagaged in the domestic, intercoastal or coastwise service. It further provides that the Board shall not grant any application which it finds "will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act." In the instant case, the Board found that grant of petitioner's application would result in unfair competition to Matson Navigation Company, which also operates in the Pacific Coast-Hawaii trade, and would be prejudicial to the objects and policy of the Merchant Marine Act, 1936.

[3] Although the United States concurred in the motion, it further argued that the Board had erred on the merits.

orders entered under authority of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, "does not vest this court with jurisdiction to review" an order entered under authority of the Merchant Marine Act, 1936; and that it did not "find that this produces an unreasonable result, or one plainly at variance with the policy of the legislation as a whole, or that legislative history requires a different interpretation."

Following the dismissal of the petition by the court of appeals, petitioner moved for summary judgment in the district court proceeding. That case is now pending on that motion and on defendants' cross motions for dismissal, summary judgment, and judgment on the pleadings.

ARGUMENT

The holding of the court of appeals that the limited grant of jurisdiction in 5 U. S. C. 1032 to review Board orders which are entered under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933 does not give it jurisdiction to review orders under the Merchant Marine Act, 1936, is clearly correct, and there is no occasion for further review by this Court.

On its face, 5 U. S. C. 1032 limits the court of appeals' jurisdiction to two categories of Board orders: those entered under the 1916 and the 1933 Acts, as amended. Petitioner attempts to avoid this plain meaning by arguing (Pet. 9–10) that the Merchant Marine Act, 1936, is in fact a part of the Shipping Act, 1916, "as amended," since the 1936 Act "not only amends the basic shipping laws of the United States first enacted in the Shipping Act, 1916," but

also amends the latter Act "in numerous detailed respects."[4]

But the fact that the 1936 Act amends the 1916 Act in some respects does not make it a part of the latter Act "as amended." The 1936 Act is not merely an amendment of the earlier statute, but is a separate Act, with its own short title ("Merchant Marine Act, 1936," 46 U. S. C. 1245) and with a discrete purpose. It is primarily a promotional statute dealing with subsidy and other forms of Government aid in the construction and operation of American-flag ships. The 1916 Act, on the other hand, is basically a regulatory statute governing such matters as competitive practices by carriers, agreements among them, and their dealings with shippers.

The phrase "Shipping Act, 1916" is the short title which Congress gave that Act. 46 U. S. C. 842. Had Congress intended in 5 U. S. C. 1032 to give courts of appeals jurisdiction over orders under the 1936 Act, it presumably would have referred to that statute by its short title ("Merchant Marine Act, 1936"), as it did with respect to the 1916 Act. Further indication that Congress did not intend to treat the 1936

[4] Petitioner further contends (Pet. 12) that even if the 1936 Act is not a part of the 1916 Act "as amended," the court of appeals nonetheless had jurisdiction to review the Board's order because it was entered "under authority" of the 1916 Act. It urges that the order is subject to Section 23 of the 1916 Act, which specifies the duration of Board orders "made" under the 1916 Act "as amended or supplemented." But the reference in 5 U. S. C. 1032 to orders entered "under authority" of the 1916 Act obviously means orders entered pursuant to that Act, *i. e.*, those which effectuate its substantive provisions, and not orders entered under some other Act which may be subject to certain procedural provisions of the 1916 Act.

Act as part of the 1916 Act "as amended" is that it specifically conferred jurisdiction to review Board orders entered under the Intercoastal Shipping Act, 1933. Since the title of the latter Act is "An Act Amending the Shipping Act, 1916, as amended, * * *" (47 Stat. 1425), there was no need to refer to the 1933 Act if, as petitioner contends, an Act which amends the 1916 Act thereby becomes part of the 1916 Act "as amended."

Petitioner contends (Pet. 11-12) that the legislative history of the Judicial Review Act of 1950 supports its view. It relies on statements of representatives of the Maritime Commission (the statutory predecessor of the Board) that the Act should apply to "all reviewable orders" of the agency. But these statements were made in response to the fact that the original bill (H. R. 2916, 81st Cong., 1st sess.) limited review to orders entered under specified sections of the 1916 and 1933 Acts. Read in context, these statements meant only that the Judicial Review Act should be extended to cover all agency orders entered under the 1916 and 1933 Acts, and should not be limited to those entered under particular sections thereof. The Commission's representatives did not urge, as petitioner implies, that the Judicial Review Act should apply to all orders entered by the agency under all of the statutes which it administers.

Petitioner also argues (Pet. 10-11) that since the Maritime Administration (as distinguished from the Board) issues orders only under the 1936 Act, the grant of jurisdiction to the courts of appeals to review orders of the Administration indicates a Con-

gressional purpose to provide for court of appeals' review of orders under the 1936 Act. A more logical explanation of the reference to the Administration, however, is that the Judicial Review Act of 1950 was drafted at approximately the same time that Reorganization Plan No. 21 of 1950 (64 Stat. 1273) went into effect. That plan divided the functions of the former Maritime Commission between the Federal Maritime Board and the Maritime Administration by assigning certain specified functions to the Board and giving the remaining functions to the Administration. In the Review Act, Congress apparently referred to the Administration as well as the Board in order to guard against the possibility that certain functions under the 1916 or 1933 Acts might have been given to the Administration or that, in some subsequent reorganization, some of the functions under those Acts which Reorganization Plan No. 21 gave to the Board might be transferred to the Administration.[5] In view of the clear limitation of jurisdiction in the Review Act to orders entered under the 1916 and 1933 Acts, and the absence of any reference in the legislative history to orders under the 1936 Act, the mere reference to the Administration does not indicate that Congress intended to make orders under the 1936 Act reviewable under 5 U. S. C. 1032.

[5] Petitioner's suggestion (Pet. 12–13) that the decision below is "germinating the seed of conflict" because of the dictum in a footnote in *Richfield Oil Corp.* v. *United States*, 207 F. 2d 864, 869, note 6a (C. A. 9) that, "contrary to our assumption, Congress may have contemplated that [certain] orders of that [Maritime] Administration * * * were reviewable under the Act of Dec. 29, 1950, by the courts of appeals," constitutes no basis for granting certiorari.

Finally, we point out that dismissal of the petition to review by the court of appeals does not deny petitioner its right to effective judicial review of the Board's order. For, as noted (see *supra*, pp. 5, 6), there is presently pending before the district court a complaint in which petitioner is challenging the same order. If the district court ultimately should decide against petitioner,* petitioner may seek appellate review of that decision in ordinary course. Thus, the sole consequence of the ruling below is to require petitioner in the first instance to challenge the Board's order in the district court rather than in the court of appeals.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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* In the district court the Board, in addition to defending its order on the merits, has denied that it is reviewable at all

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 319

PACIFIC FAR EAST LINE, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, and CLARENCE G. MORSE, MARITIME ADMINISTRATOR,
Respondents,

MATSON NAVIGATION COMPANY,
Intervenor.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief of Intervenor Matson Navigation Company in Opposition

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QUESTION PRESENTED

The questions allegedly presented are stated in the petition in a highly argumentative fashion. We believe that only one question is presented by these proceedings and that it may be fairly stated as follows:

Did the court below err in its holding that it lacked jurisdiction to review an order of the Federal Maritime Board and Maritime Administration entered under authority of the Merchant Marine Act, 1936, when the only source of jurisdiction was a statute, the Review Act of 1950, affording review in that court only of orders "entered under authority of the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended * * *"?

STATEMENT OF THE CASE

Petitioner Pacific Far East Line, Inc. (hereafter called PFEL) is a subsidized steamship operator in foreign trade (R. 5). By electing, in 1953, to obtain an operating subsidy from the United States pursuant to Titles VI and VIII of the Merchant Marine Act, 1936, 49 Stat. 1985, 46 U.S.C. 1171-82, 1211-27, PFEL likewise necessarily elected to be bound by the restraints imposed by Congress in Section 805(a) of that Act, 46 U.S.C. 1223(a). The restraints of that section, intended to prevent unfair competition by subsidized foreign-trade operators against unsubsidized operators in the domestic trade, derive solely from a voluntary election to receive the Government's bounty. They are inapplicable to unsubsidized operators, who are free, as was PFEL prior to 1953, to enter the Hawaiian trade without franchise or permission of any kind (R. 18).

Pursuant to Section 805(a) and the terms of its subsidy contract, PFEL applied to the Federal Maritime Board and Maritime Administration (hereafter called the Board) for permission to enter the domestic Hawaiian trade in competition with, among others, Matson Navigation Company, an unsubsidized operator in that trade. After a lengthy hearing before the Board's examiner, briefs, exceptions and oral argument, the Board denied the permission sought on both

of the alternative statutory grounds, (1) that such permission would be prejudicial to the objects and policy of the Act and (2) that it would result in unfair competition to Matson (R. 17-18).

PFEL thereupon launched a two-pronged attack on the Board's order. It filed the present proceedings in the court below, basing jurisdiction on Section 2 of the Review Act of December 29, 1950, 64 Stat. 1129, 5 U.S.C. 1032, and simultaneously filed a complaint in the United States District Court for the District of Columbia (No. 1708-57), basing jurisdiction on Section 10 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1009. The latter case is now pending before the court on motions and cross-motions for summary judgment and other relief.

In the court below, the Board moved to dismiss for lack of jurisdiction. The United States concurred and Matson filed its own motion to the same end. Apparently deeming it advisable to consider the question of jurisdiction in the light of the full record and more complete briefing and deliberation, the court denied the motions "without prejudice to their renewal at the hearing of this case on the merits" (R. 637).

The jurisdictional question was thereafter renewed in the briefs on the merits.* Following such further considera-

*Arguments were presented to the court below on aspects of the jurisdictional question in addition to the inapplicability of the Review Act of 1950. These included the point that the petition for review was not timely filed, that the order of which review was sought was not final and that the Board's order was, by its nature, of a discretionary character not subject to judicial review. In view of its disposition of the case, the court did not reach these questions, and they are not presented by the petition. If certiorari should be granted, these and other questions may be appropriate for consideration.

tion, the court dismissed on the ground that a "'plain meaning' reading" of the Review Act compelled dismissal (R. 640-41).

ARGUMENT

Scant attempt is made in the petition to show any of the grounds for certiorari specified in Rule 19(1) and the decisions of this Court.

The Review Act of 1950 has been on the books for almost eight years. Yet that period has produced not a single prior case raising the question decided below. This would seem to be ample evidence that the question lacks the importance required for decision by this Court.

The attempt to spin out "the seed of conflict" (Petition, p. 12) between the decision below and a footnote dictum in the Ninth Circuit (*Richfield Oil Corp. v. United States*, 207 F.2d 864, 869, n. 6a) scarcely requires an answer.*

These considerations apart, the decision below was clearly correct. For reasons which we understand will be more fully presented in the brief of the Government respondents in opposition, the unequivocal language of the Review Act of 1950, its legislative history and the structure and purpose of the Merchant Marine Act, 1936, lead to the inescapable conclusion that the court below lacked jurisdiction.

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*The Ninth Circuit made it clear in the footnote referred to that the question of the applicability of the Review Act of 1950 was not presented or decided. In fact, the footnote assumes that the Review Act applies only to orders entered under two specified sections of the Shipping Act, 1916. It then goes on to mention that the reference to the Maritime Administration may indicate otherwise.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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